APR 12 1944

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 758.

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION, PETITIONER,

VS.

THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1, RESPONDENT.

ANSWER BRIEF.

FRANK NESBITT,
NELLE NESBITT,
Miami, Oklahoma,
Attorneys for Respondent.

INDEX

I. Statement As to Nature of Action 1

II. Statement of Facts 2

III. Summary of Argument 8

IV. Brief and Argument 10

Controversy in case involves only a dispute of facts on which the authority was exercised and the immunity claimed, by reason whereof jurisdiction should be refused 11

Champion Lumber Co. vs. Fisher, 227 U. S. 445, 57 L. Ed. 591, 33 Sup. Ct. Rep. 329 ..... 8, 11

Foreman vs. Meyer, 227 U. S. 452, 57 L. Ed. 594, 33 Sup. Ct. Rep. 331 ..... 8, 11

Hyatt vs. People ex rel. Corkran, 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456 ..... 8, 11

Ireland vs. Woods, 246 U. S. 323, 62 L. Ed. 745, 38 Sup. Ct. Rep. 319 ..... 8, 11

The petitioner herein exceeded any authority it may have had as an agency of the United States in flooding lands which it was required to acquire by the license of the Federal Power Commission, but failed to do, and by reason thereof it has no immunity against suit 15

American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, 23 Sup. Ct. Rep. 33, 38 ..... 8, 18

Belknap vs. Schild, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 U. S. (L. Ed.) 599 ..... 8, 16

Bates vs. Clark, 95 U. S. 204, 24 U. S. (L. Ed.) 471 ..... 8, 16

Cammeyer vs. Newton, 94 U. S. 225, 235, 24 U. S. (L. Ed.) 72 ..... 8, 17

Campbell vs. James, 17 Blatchf. 42, 4 B. & A. Pat. Cas. 456, 4 Fed. Pat. Cas. No. 2361 ..... 8, 17
Campbell vs. James, 18 Blatchf. 92, 2 Fed. 338 ..... 8, 17
Head vs. Porter, 48 Fed. 481 ..... 8, 17
Hawks vs. Seay, 150 Okla. 160, 1 Pac. 2d 148 8-9
Little vs. Barreme, 2 Cranch 170, 2 L. Ed. 243 9
Noble vs. Union River Logging R. R. Co., 147 U. S. 165, 171, 172, 13 Sup. Ct. Rep. 271, 272, 273, 37 L. Ed. 123 9
Philadelphia Company vs. Stimson, 223 U. S. 605, 619, 620, 32 Sup. Ct. Rep. 340, 344, 56 L. Ed. 570 ..... 9, 16
Scranton vs. Wheeler, 179 U. S. 141, 152, 21 Sup. Ct. Rep. 48, 52, 45 L. Ed. 126 9
Tindal vs. Wesley, 167 U. S. 204, 222, 17 Sup. Ct. Rep. 770, 777, 42 L. Ed. 137 9
United States vs. Lee, 106 U. S. 196, 220, 221, 1 Sup. Ct. Rep. 240, 260, 261, 27 L. Ed. 171 9
Wentz vs. Ingenthron, 146 Okla. 165, 294 Pac. 154 9
Wentz vs. Board of Comr's, 147 Okla. 173, 295 Pac. 599 9
Wentz vs. Dawson, 149 Okla. 94, 299 Pac. 493 9
State Highway Commission vs. Younger, 170 Okla. 614, 41 Pac. 2d 686 ..... 9, 17

V. Conclusion 21

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 758.

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION, PETITIONER,

VS.

THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1, RESPONDENT.

ANSWER BRIEF.

I.

STATEMENT AS TO NATURE OF ACTION.

As originally instituted, this is a special proceeding for the recovery of damages, filed in the District Court of Ottawa County, Oklahoma, by the Board of Education of the Town of Wyandotte, Oklahoma, Independent School District No. 1, as plaintiff, against the Grand River Dam Authority, a public corporation, as defendant, predicated on the "Conservancy Act" of the State of Oklahoma, Tit. 82, Sec. 664, Okla. Stats. Ann.

Pursuant to the provisions of Section 61 of said Act, the Judge of said District Court appointed appraisers to view the property in question and appraise the damages, if any. These appraisers took the oath of office as such, viewed the premises, and as shown by their Report (R. 7, 8) determined the damages due plaintiff in the sum of $873.65. Exceptions to this Report were filed by both plaintiff and defendant, and, after a trial of the issues made by the exceptions, the said District Court rendered judgment in favor of plaintiff against defendant for the sum of $902.65 (R. 94, 95, 96). Defendant filed a Motion for new trial, same was heard and overruled and an appeal was prosecuted to the Supreme Court of the State of Oklahoma by defendant, where the judgment of the trial court was affirmed (R. 125 to 130, incl.).

II.

STATEMENT OF FACTS.

The Grand River Dam Authority is a public corporation organized and functioning by virtue of an Act of the Oklahoma Legislature approved April 26, 1935 (Okla. S. L., 1936, Ch. 70, Art. 4, Sec. 1; Tit. 82, Sec. 861, Okla. Stats. Ann.).

By virtue of this Act the Grand River Dam Authority is authorized to control, store and preserve the waters of the Grand river and its tributaries and make use of such waters for irrigation purposes, the generation of electrical energy, and other useful purposes. The Authority has erected a large dam across Grand river in Mayes County, Oklahoma, near the Town of Pensacola, and by means thereof it has converted the waters of Grand river (above the dam), Neosho and Spring rivers into a large lake that extends some 55 miles above the dam.

Inasmuch as this dam and its operation affects the navigable stages of the Arkansas river, the Authority procured a license from the Federal Power Commission authorizing the construction and operation of this dam, its power plant, etc. This license requires the Authority to acquire all necessary land for its lake bed, bordering the Grand river and its tributaries, up to elevation 750 feet above mean sea level (R. 37), it authorizes the use of the waters of the lake up to elevation 745 feet for power production purposes, and limits the use of the waters of the lake from elevation 745 feet to 755 feet to control floods. The license provides that the impounding and releasing of the waters of the lake between elevations 745 feet and 755 feet shall be under the direction of the Secretary of War or his authorized representative, with this further provision (R. 37):

> "Article 13. * * * *provided: that the Licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation.*"

It was stipulated during the trial of the case in the trial court, that neither the Authority nor the United States has ever acquired flowage rights above elevation 750 feet, over the lands in question or in the vicinity thereof (R. 44). Section 17 of the License (R. 38) makes the Authority liable for all damages occasioned to the property of others on account of the construction, operation and maintenance of the "project works" or of the works appurtenant or accessory thereto, and in no event shall the United States be liable therefor.

For the purpose of controlling flood waters flowing into its said lake the Authority has equipped its dam with several large water gates, so that it was able to control the water level of its lake between the 745 foot and 750

foot levels by the opening and/or closing of one or more of these gates.

The Respondent Board of Education owns a tract of land in the Town of Wyandotte, Oklahoma, on which several school buildings are located and the property is used solely for public school purposes. The 750 foot contour line of the Authority's lake bed just touches the northwest corner of this school property (R. 60), and the gymnasium building which is the nearest, is about 100 feet from this contour line (R. 49). This gymnasium stands on relatively high ground, there being quite an abrupt drain towards the northwest into the lake itself (R. 87), and the ground towards the northwest of the gymnasium is principally gravel (R. 49). The gymnasium floor is two or three feet below the surface of the ground (R. 81). A deep water well, which is the sole supply of drinking water for the school children is located at the southwest corner of the gymnasium (R. 61), within four to six feet of that building (R. 50), and the surface of the ground at the well is four to five feet above the 750 foot level (R. 64).

When the water in Authority's lake stands below the 750 foot level, the water in this deep well doesn't get muddy (R. 76), *and there is no water on the gymnasium floor* (R. 80), *but when the water in Authority's lake got up to the approximate elevation of 752 feet there was about 4 inches of water on the gymnasium floor* (R. 80), *and the water in the well was thick* (R. 76). THUS, IT IS PLAIN THAT WHETHER OR NOT THE WATER OF AUTHORITY'S LAKE AFFECTED RESPONDENT'S PROPERTY DEPENDED ALTOGETHER ON WHETHER OR NOT THE WATER LEVEL OF THE LAKE WAS MAINTAINED ABOVE OR BELOW THE 750 FOOT ELEVATION.

In the months of October and November, 1941, heavy rains caused a considerable volume of flood water to flow down the Neosho and Spring rivers into the Authority's lake. When the dam gauge showed the water level of the lake had risen above the 745 foot elevation W. C. Burnham, the Authority's hydraulic engineer, notified the Divisional engineer of the War Department located at Tulsa, Oklahoma, and thereafter Burnham regulated the water level of the lake by the opening and/or closing of the dam gates under the orders of the Divisional engineer of the War Department (R. 100, 111). On October 30, 1941, Burnham received an order by wire from this Divisional engineer (R. 109) as follows:

> "You are hereby directed to open one main spillway gate immediately. Seven main spillway gates and one small spillway gate will be kept open until further instructions are received. If the reservoir reaches elevation 749.7 spillway gates will be opened so that the outflow will approximately balance the inflow. Under no circumstances will the pool level be allowed to rise above elevation 750.0 on the dam gate."
>
> Montgomery.

When Burnham received this wire he immediately called the Divisional engineer by phone and advised him that *an elevation of* 749.7 *feet of the water level of the lake at the dam gauge meant an elevation of about* 752 *feet at Wyandotte* (R. 123, 124), but he was instructed to proceed according to instructions, nevertheless. Acting on this order from the Divisional engineer, Burnham permitted the water level of the lake to build up to elevation 749.7 feet by the dam gauge (R. 123, 124), and, exactly as Burnham had told the Divisional engineer, the water level of the lake at Wyandotte reached the approximate elevation of 752 feet (R. 47, 75), *or some*

two feet above the elevation to which the Authority had acquired land for its lake bed, forcing the back water of the lake upon and over the school property about 50 feet beyond the 750 foot contour line (R. 48, 55) and so close to the gymnasium building that the water infiltrated through the gravel soil the remaining distance into the building where it stood about four inches deep on the oak floor of the gymnasium proper and from ten to twelve inches deep in the side and dressing rooms (R. 49) and filled the deep water well full of muddy water.

The finish on the oak floor of the gymnasium was ruined and the floor buckled in several places (R 64), as much as a foot (R. 65), athletic equipment and musical instruments were damaged (R. 66, 67), the water in the deep water well could not be used for drinking purposes (R. 70), trash and debris was piled up on the school grounds causing noxious odors (R. 74), and it was necessary to dismiss school during the period of both overflows (R. 74).

The Town of Wyandotte, Oklahoma, is located at the confluence of the Neosho and Spring rivers, where the Grand river begins. When flood waters flow down the Neosho and Spring rivers and strike the stationary water of the main body of the lake at this point of confluence, the stationary water of the lake is almost as effective a dam as stone and concrete and causes a pile-up of water, raises the water level of the lake at that point some two or three feet higher than further down the lake, and forces the back water over the immediately surrounding territory. *This fact was well known to W. C. Burnham, the Authority's hydraulic engineer* (R. 123), and is commented on by the Federal Power Commission in its letter to the Authority, which letter was introduced in evidence by the Authority itself (R. 100) *in haec verba*:

"It is a known fact that backwater effects result from the impounding of waters *and failure to take such effects into consideration in acquiring sufficient lands cannot create a liability against the United States.* Articles 12 and 13 of the License confirm this interpretation."

Therefore, if the term—*"750 foot level"*—as that term is used in the License, means the water level of the lake as fixed by the gauge at the dam, as the Authority now contends, *then the Authority should have taken these well known backwater effects into consideration in acquiring land for their lake bed and should have acquired land to the 752 or 753 foot elevation in the vicinity of Wyandotte,* for certainly there is no law nor is there any authority in the License of the Federal Power Commission that would permit the accumulation of water in the lake to the 750 foot elevation at the dam, and thereby cause a trespass on the land and a damage to the property of others in the Town of Wyandotte with two or three feet of backwater.

On the other hand if the term—*"750 foot level"*—as that term is used in the License, means the water level of the lake at all points thereon, then, in view of the admitted fact that neither the Authority nor the United States had acquired land in the vicinity of Wyandotte for their lake bed above the 750 foot elevation (R. 44), the Divisional engineer was acting beyond his jurisdiction and the lawful scope of his authority in directing the water level to be built up to the 749.7 foot level by the dam gauge when he knew that such level meant a water level of 752 to 753 feet at Wyandotte, and the Authority should have refused to obey such unlawful and unauthorized order in view of the following quoted portion of Article 13 of the License (R. 37), towit:

"The Licensee shall impound flood waters in the storage space between elevations 745 and 755, and release flood waters therefrom, when, as, and in the manner directed by the Secretary of War, or his authorized representative: *Provided, that the Licensee shall not be required to impound any water above elevation* 750 *until the United States has acquired the necessary flowage rights above that elevation.*"

III.

SUMMARY OF ARGUMENT.

1. The controversy in this case involves only a dispute of facts on which the authority was exercised and the immunity claimed, by reason whereof jurisdiction should be refused. *Champion Lumber Company* v. *Fisher,* 227 U. S. 445, 57 L. Ed. 591, 33 Sup. Ct. Rep. 329; *Foreman* v. *Meyer,* 227 U. S. 452, 57 L. Ed. 594, 33 Sup. Ct. Rep. 331; *Hyatt* v. *People ex rel. Corkran,* 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 465; *Ireland* v. *Woods,* 246 U. S. 323, 62 L. Ed. 745, 38 Sup. Ct. Rep. 319.

2. The Petitioner herein exceeded any authority it may have had and acted in excess of any authority as an agency of the United States in flooding lands which it was required to acquire by the License granted to it by the Federal Power Commission, but failed to do so, and by reason thereof it has no immunity against suit. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 23 Sup. Ct. Rep. 33, 38; *Belknap* v. *Schild,* 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 U. S. (L. Ed.) 599; *Bates* v. *Clark,* 95 U. S. 204, 24 U. S. (L. Ed.) 471; *Cammeyer* v. *Newton,* 94 U. S. 225, 235, 24 U. S. (L. Ed.) 72; *Campbell* v. *James,* 17 Blatchf. 42, 4 B. & A. Pat. Cas. 456, 4 Fed. Pat. Cas. No. 2361; *Campbell* v. *James,* 18 Blatchf. 92, 2 Fed. 338; *Head* v. *Porter,* 48 Fed. 481; *Hawks* v. *Seay,*

150 Okla. 160, 1 Pac. 2d 148; *Little* v. *Barreme,* 2 Cranch 170, 2 L. Ed. 243; *Noble* v. *Union River Logging R. R. Co.,* 147 U. S. 165, 171, 172, 13 Sup. Ct. Rep. 271, 272, 273, 37 L. Ed. 123; *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 619, 620, 32 Sup. Ct. Rep. 340, 344, 56 L. Ed. 570; *Scranton* v. *Wheeler,* 179 U. S. 141, 152, 21 Sup. Ct. Rep. 48, 52, 45 L. Ed. 126; *Tindal* v. *Wesley,* 167 U. S. 204, 222, 17 Sup. Ct. Rep. 770, 777, 42 L. Ed. 137; *United States* v. *Lee,* 106 U. S. 196, 220, 221, 1 Sup. Ct. Rep. 240, 260, 261, 27 L. Ed. 171; *Wentz* v. *Ingenthron,* 146 Okla. 165, 294 Pac. 154; *Wentz* v. *Board of Comr's,* 147 Okla. 173, 295 Pac. 599; *Wentz* v. *Dawson,* 149 Okla. 94, 299 Pac. 493; *State Highway Commission* v. *Younger,* 170 Okla. 614, 41 Pac. 2d 686.

IV.

BRIEF AND ARGUMENT.

Petitioner seeks to invoke the jurisdiction of the Supreme Court of the United States on the ground that, at the time petitioner inflicted the injury and caused the damage to Respondent's property, for which recovery has been sustained by the State Courts, it was acting as an agency of the United States, was entitled to the same immunity from suit as the United States, that it claimed that immunity in the State Courts and the same was denied. Petitioner therefore claims the case comes within the provisions of Section 237c of the Judicial Code, as amended by the Act of January 31, 1928, Ch. 14, Sec. 1 (45 Stat. 54), Tit. 28, Sec. 344b, U. S. C. A., which, in part, provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state * * *; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States * * *."

In keeping with the opinion and decision of the Supreme Court of the State of Oklahoma, Respondent takes the position, (1) that the injury and damage to its property was the direct result of Petitioner's negligence, its failure to comply with the terms of the license granted it by the Federal Power Commission, and to abide by the orders of the engineers of the War Department, in that (a) The Petitioner did not acquire the necessary lands for

its lake bed as required by the license, (b) The Petitioner did not keep the water level of its lake below the 750 foot elevation as directed by the engineers of the War Department, and by reason of such failures and neglect Petitioner cannot claim immunity from action in damages.

Thus, the primary dispute decided by the State Courts did not involve any question as to the existence or validity of the claimed immunity, but was a dispute of facts upon which the authority was exercised and the immunity claimed, under which circumstances this Honorable Court has uniformly refused to assume jurisdiction. *Ireland* v. *Woods*, 246 U. S. 323, 62 L. Ed. 745, 38 Sup. Ct. Rep. 319; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 57 L. Ed. 591, 33 Sup. Ct. Rep. 329; *Foreman* v. *Meyer*, 227 U. S. 452, 57 L. Ed. 594, 33 Sup. Ct. Rep. 331; *Hyatt* v. *People ex rel. Corkran*, 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456.

Article 12 of the License granted Petitioner by the Federal Power Commission, required Petitioner to acquire lands for its lake bed to the 750 foot level (R. 37). Petitioner admits that it acquired land to the 750 foot level only, *at all points on its lake* (R. 44). Petitioner admits that its hydraulic engineer knew that due to the pile-up of water at Wyandotte, Oklahoma, a water level of 750 feet by the dam gauge meant a water level of about 752 feet at Wyandotte (R. 123, 124), but Petitioner made no effort to acquire the land necessary to carry this pile-up of water (R. 44).

Article 13 of the License granted Petitioner by the Federal Power Commission, permits the Petitioner to use the waters of the lake up to elevation 745 feet for production of power, reserves the storage space between the 745 foot and the 755 foot levels for flood control, but provides* * * "*the Licensee shall not be required to impound*

any water above elevation 750 *feet until the United States has acquired the necessary flowage rights above that elevation"* (R. 37). The parties stipulated that neither Petitioner nor the United States had ever acquired flowage rights above the 750 foot level (R. 44).

In the months of October and November, 1941, heavy rains caused a considerable volume of flood water to flow down the Neosho and Spring rivers into Petitioner's lake. When the dam gauge showed the water elevation of the lake had risen above the 745 foot level, W. C. Burnham, the Petitioner's hydraulic engineer notified the War Department's engineers at Tulsa, Oklahoma, and thereafter Burnham regulated the water level of the lake by the opening and/or closing of the gates of the dam, as directed by the engineers of the War Department (R. 100, 111). On October 30, 1941, Burnham received the following order by wire (R. 109):

> You are hereby directed to open one main spillway gate immediately. Seven main spillway gates and one small spillway gate will be kept open until further instructions are received. If the reservoir reaches elevation 749.7 spillway gates will be opened so that the outflow will approximately balance the inflow. *Under no circumstances will the pool level be allowed to rise above elevation* 750.0 *on the dam gate.*
>
> Montgomery.

When Burnham received this order he called the Engineer's office and told them that an elevation of 749.7 feet of water by the dam gauge meant an elevation of about 752 feet at Wyandotte, Oklahoma (R. 123), but he was directed to proceed according to the order, nevertheless, *as the engineers for the War Department had the right to and no doubt did assume that Petitioner had acquired*

enough land for its lake bed so that a water level of 750 feet by the dam gauge could be carried.

Burnham permitted the waters of the lake to build up to the 749.7 foot level by the dam gauge, and because of the pile up and backwater curve, the lake level at Wyandotte reached 752 feet, *or some two feet above the elevation to which the Petitioner had acquired land for its lake bed,* forcing the back water of the lake on Respondent's school grounds about 50 feet beyond the 750 foot contour line (R. 48, 55) and so close to the gymnasium building that the lake water infiltrated through the gravel soil the short distance remaining into the Gymnasium where it stood about 4 inches deep on the oak floor of the Gymnasium proper, about 10 to 12 inches deep in the side and dressing rooms (R. 49) and filled the deep water well full of muddy water. The finish on the oak floor of the gymnasium was ruined, the floor buckled in several places (R. 64) as much as a foot (R. 65), athletic equipment and musical instruments were damaged (R. 66, 67), the water in the deep water well could not be used for drinking purposes (R. 70), trash and debris of all kinds was piled up on the school grounds causing noxious odors (R. 74), and it was necessary to dismiss school during the period of both overflows (R. 74). For these injuries the trial court rendered and the Oklahoma Supreme Court affirmed a judgment of $902.65 (R. 90).

The Town of Wyandotte is located at the confluence of the Neosho and Spring rivers where the Grand river begins. When flood waters flow down the Neosho and Spring rivers and strike the stationary water of the lake at this point of confluence, the stationary water of the lake is almost as effective a dam as stone and concrete and causes a pile-up of water, raises the water level at

that point some two or three feet higher than further down the lake, and forces the backwater over the immediately surrounding territory. *This natural phenomena was well known to W. C. Burnham, the Petitioner's hydraulic engineer* (R. 123), and is commented on by the Federal Power Commission in its letter to Petitioner, which letter was introduced in evidence by the Petitioner itself, in these words (R. 100):

> "It is a known fact that backwater effects result from the impounding of waters and *failure to take such effects into consideration in acquiring sufficient lands cannot create a liability against the United States.* Articles 12 and 13 of the License confirm this interpretation."

Now if the term—"*750 foot level*"—as that term is used in the License, means the water level of the lake, *as fixed by the gauge at the dam,* as the Federal Power Commission held and as Petitioner now contends, then Petitioner was negligent and failed to comply with the terms of its license in that it should have taken these well known backwater effects into consideration in acquiring land for its lake bed and should have acquired land to the 752 or 753 foot elevation in the vicinity of Wyandotte so as to carry a water elevation of 750 feet at the dam gauge.

On the other hand, if the term—"*750 foot level*"—as that term is used in the license, means the water level of the lake at all points thereon, then, in view of the admitted fact that neither Petitioner nor the United States had acquired land in the vicinity of Wyandotte for the lake bed above the 750 foot elevation (R. 44), the order of the War Department's engineer was beyond his jurisdiction and authority and the Petitioner should have refused to abide by such an order when it knew that a water

level of 749.7 feet at the dam meant a water level of 752 to 753 feet at Wyandotte, and it further knew that Article 13 of the License in part provides (R. 37):

> "The Licensee shall impound flood waters in the storage space between elevations 745 and 755, and release flood waters therefrom, when, as and in the manner directed by the Secretary of War, or his authorized representative; *provided, that the Licensee shall not be required to impound any water above elevation* 750 *until the United States has acquired the necessary flowage rights above that elevation.*"

Petitioner failed to acquire sufficient land for its lake bed so as to permit a lake water level of 750 feet by the dam gauge, as is specifically required by the License granted to it by the Federal Power Commission. When that failure was the proximate cause of the damage and injury as in the case at bar, then it cannot successfully claim protection of immunities given the United States, for the United States was acting within its legal rights when it ordered the water level built up to 749.7, but the Petitioner was certainly exceeding its authority when it flooded lands above the 750 foot level which it did not own and which it should have acquired, by the very provisions of its license. The rule here contended for is quite well stated in one of the decisions cited by Petitioner in its brief, *i. e., Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 60 Sup. Ct. Rep. 413, 414, as follows:

> "Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 619, 620, 32 S. Ct. 340, 344, 56 L. Ed. 570. See *United States* v. *Lee*, 106 U. S. 196, 220, 221, 1 S. Ct.

240, 260, 261, 27 L. Ed. 171; *Noble* v. *Union River Logging R. R. Co.*, 47 U. S. 165, 171, 172, 13 S. Ct. 271, 272, 273, 37 L. Ed. 123; *Tindal* v. *Wesley*, 167 U. S. 204, 222, 17 S. Ct. 770, 777, 42 L. Ed. 137; *Scranton* v. *Wheeler*, 179 U. S. 141, 152, 21 S. Ct. 48, 52, 45 L. Ed. 126; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108, 110, 23 S. Ct. 33, 38, 39, 47 L. Ed. 90."

In the body of the opinion in the case of *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 32 Sup. Ct. Rep. 340, 344, this Honorable Court plainly laid down this rule of law:

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. *Little* v. *Barreme*, 2 Cranch 170, 2 L. Ed. 243; *United States* v. *Lee*, 106 U. S. 196, 220, 221, 27 L. Ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; *Belknap* v. *Schild*, 161 U. S. 10, 18, 40 L. Ed. 599, 601, 16 Sup. Ct. Rep. 443; *Tindal* v. *Wesley*, 167 U. S. 204, 42 L. Ed. 137, 17 Sup. Ct. Rep. 170; *Scranton* v. *Wheeler*, 179 U. S. 141, 152, 45 L. Ed. 126, 133, 21 Sup. Ct. Rep. 48."

The rule is also stated as follows:

> "The exemption of the United States from judicial process does not protect its officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. Such officers or agents, although acting under order of the United States, are therefore personally liable to be sued."
>
> *Belknap* v. *Schild*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 U. S. (L. Ed.) 599.
>
> *Bates* v. *Clark*, 95 U. S. 204, 24 U. S. (L. Ed.) 471.

Cammeyer v. *Newton*, 94 U. S. 225, 235, 24 U. S. (L. Ed.) 72.

Campbell v. *James*, 17 Blatchf. 42, 4 B. & A. Pat. Cas. 456, 4 Fed. Pat. Cas. No. 2361.

Campbell v. *James*, 18 Blatchf. 92, 2 Fed. 338.

Head v. *Porter*, 48 Fed. 481.

In the case of *State Highway Commission* v. *Younger*, 170 Okla. 614, 41 Pac. 2d 686, the Oklahoma Supreme Court has followed the rule laid down by this Honorable Court. In the body of the opinion in that case the Court held:

> "The rule defining the distinction between an action against the State and an action against State officers was laid down and applied by this court in the following cases: *Wentz* v. *Ingenthron*, 146 Okla. 165, 294 Pac. 154; *Wentz* v. *Board of Comr's*, 147 Okla. 173, 295 Pac. 599; *Wentz* v. *Dawson*, 149 Okla. 94, 299 Pac. 493; and *Hawks* v. *Seay*, 150 Okla. 160, 1 Pac. 2d 148; and it is stated as follows:
>
> When officers of the state act under invalid authority, or exceed or abuse their lawful authority, and thereby invade private rights that are secured by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the State, since the acts of officials not legally authorized, or that exceed or abuse authority of discretion conferred upon them, are no acts of the State."

If the term—"*750 foot level*"—as that term is used in the License, means a 750 foot elevation at all points on and abutting on the lake, and the Petitioner knew that a water level of 749.7 feet by the dam gauge meant a water level of 752 to 753 feet at Wyandotte, Oklahoma, then the War Department's engineer acted in excess of his power, right and authority in directing a water level of 749.7 feet at the dam, and the Petitioner should not have followed such

direction in the face of the proviso in Article 13 of the License, which provides (R. 37):

> *"provided, that the Licensee shall not be required to impound any water above elevation* 750 *until the United States has acquired the necessary flowage rights above that elevation."*

It was admitted by all parties that the United States had not acquired flowage rights above the 750 foot elevation (R. 44). The power of the Divisional Engineers of the War Department was founded on the provisions of the License, and their acts and orders must find a basis in law. In the case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 23 Sup. Ct. Rep. 33, 38, this Honorable Court said:

> "That the conduct of the Postoffice is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of the Department, which is unauthorized by the Statute under which he assumes to act. *The acts of all its officers must be justified by some law, and in case the officials violate the law to the injury of an individual the courts generally have jurisdiction to grant relief."*

This is not an action where the Petitioner confined the waters of its lake within proper bounds and natural seepage or percolation of the lake water caused the injury. *It is a case where Petitioner purposely permitted the water level of its lake to build up to such a point that the lake water got 50 feet or more beyond the lake bed and trespassed on the Respondent's lands, coming in such close proximity to the buildings as to partially fill them with water, which would not have occurred but for the tres-*

pass. It is a case where the petitioner clearly exceeded its lawful authority and in so doing invaded private rights, for even Petitioner itself does not seek to justify its action in trespassing on Respondent's property with two feet of water, it simply asks immunity from an action in damages on the theory that it was functioning as an agency of the United States Government. An examination of the decisions cited by Petitioner, in every instance indicates that the Agency of the United States Government *was acting according to law or within the bounds of a contract with the Government.* Let us take for illustration the case upon which petitioner places so much reliance, towit, *Chattanooga & Tennessee River Power Co.* v. *Lawson,* (Tenn.) 201 S. W. 165, the second syllabus is:

> "A private contractor, building a dam to be deeded to the United States in a navigable stream *under direction and according to specifications of the United States,* is liable only to the same extent as the Government, which is not liable for the consequential damages to the tenant at will of one who has been compensated for land taken, by alternate overflow and recession of water, causing stagnation and breeding mosquitoes which infected plaintiff and his family with malaria."

At pages 168, 169, of the opinion the court said:

> "The plaintiff in error was guilty of no negligence, having performed the work strictly in accord with the specifications furnished to it by its employer."

At page 170 of the opinion it is said:

> "It is equally preposterous to say that the servants of the Government, in executing, *without negligence,* the orders of the Government, would be responsible to third parties on the ground that the Gov-

ernment works would make the neighborhood unhealthy."

The courts appear to be agreed on the proposition that if an agency of the United States was acting according to law or within the bounds of a contract with the United States, the agency enjoys the same immunity from suit in damages as does the United States. But such is not the situation at bar by any means. The uncontroverted and admitted facts are that the Petitioner trespassed on the Respondent's property with two feet of backwater and inflicted injury to its property, that Petitioner had not complied with the provisions of the License granted it by the Federal Power Commission requiring it to acquire adequate land for a lake water level of 750 feet by the dam gauge, and its failure to comply with the terms of the License was the proximate cause of the injury and damage to Respondent.

The engineers of the War Department certainly had the right to assume that the Petitioner had acquired sufficient land for its lake bed to permit the lake water level to be built up to the 750 foot level by the dam gauge, because the License required the Petitioner to acquire such lands. When these engineers directed the Petitioner to permit the lake water level to raise to the 749.7 foot level, they made no mistake, as is argued by Petitioner at pages 14, 15 and 23 to 28, inclusive, because the License contemplates their right to control the waters between the 745 and 750 foot levels. The sole mistake that was made was when Petitioner failed to comply with the requirements of the License and acquire the necessary land to carry a lake water level of 750 feet by the dam gauge.

Therefore the record shows that the primary dispute in the case decided by the State Courts did not involve any question as to the validity or existence of the im-

munity claimed, but was a dispute of facts upon which the authority was exercised and the immunity claimed, under which circumstances this Honorable Court has uniformly refused to assume jurisdiction (See decisions first herein cited).

V.

CONCLUSION.

In view of the state of the record as above indicated, the remaining propositions advanced and argued by Petitioner address themselves to hypothetical rather than actual questions. We therefore ask this Honorable Court for its order denying the petition herein.

Respectfully submitted,

FRANK NESBITT,
NELLE NESBITT,
Miami, Oklahoma,
Attorneys for Respondent.